SUFFICIENCY OF EVIDENCE AS TO TIME OF OFFENSE UNDER THE OHIO BURGLARY STATUTE

Ohio v. Stuttler
172 Ohio St. 311, 175 N.E.2d 728 (1961)

Defendant was convicted of burglary in violation of Section 2907.10[1] of the Ohio Revised Code. The appellate court reversed, holding that there was insufficient evidence that the breaking and entering had occurred in the night season as required by the statute. The only facts presented to establish the time the crime was committed were (1) a hardware store had been forcibly entered through the sky light sometime between 4 PM on June 9 and 8 AM the following day, and (2) an office building was so situated as to present an unobstructed view of the store roof. The Ohio Supreme Court upheld the conviction holding that it was within the province of the jury to apply the common experience of mankind to the facts and circumstances of the case and arrive at a conclusion that the breaking and entering occurred in the night season.[2]

Statutory provisions governing breaking and entering with intent to commit a felony establish penalties for three classes of offenses.[3] The facts in *Stuttler* could place it within the scope of either section 2907.10 (burglary) or section 2907.15 (daytime breaking and entering) depending on the time the crime was committed.

At common law, burglary was a night time offense only,[4] and Ohio adopted this limitation[5] in Revised Code sections 2907.09 and 2907.10. The distinction between burglary and the comparable act in the daytime is based on the proposition that the risk of personal violence is substantially greater in the night season. Consequently, the criminal statutes have provided less severe punishment for the daytime offense than for burglary.[6] The Ohio

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[1] Ohio Rev. Code § 2907.10 (1953) states in part: "No person shall in the night season maliciously and forcibly break and enter, or attempt to break and enter an uninhabited dwelling house, or a . . . shop, office, storehouse, warehouse . . .or other building . . . with intent to commit a felony.

Whoever violates this section shall be imprisoned . . . not more than fifteen years."

[2] Ohio v. Stuttler, 172 Ohio St. 311, 175 N.E.2d 728 (1961). Two members of the court dissented.

[3] a) Ohio Rev. Code § 2907.09 (1953)—breaking and entering an inhabited dwelling in the night season—Maximum penalty: life imprisonment.

b) Ohio Rev. Code § 2907.10 (1953)—breaking and entering an uninhabited dwelling in night season—Maximum penalty: 15 years.

c) Ohio Rev. Code § 2907.15 (1953)—breaking and entering a dewlling in the daytime—Maximum penalty: 5 years.

[4] 4 Blackstone's Commentaries 7th Ed. 224 (1775).

[5] The Ohio statutory provision is an adoption of the limitation provided in the Laws of the Governor and Judges under the Northwest Ordinance of 1787, Chap. VII § 5. 1 Chase, Revised Statutes of Ohio 98 (1833).

[6] The statutory distinction in Ohio is first found in the Acts of the Sixth General Assembly of Ohio (1807) which provides for a maximum penalty of fifty lashes, one

law presently provides a maximum penalty of 5 years for the former as opposed to a maximum penalty of 15 years of life for the latter. By enacting special statutes with more severe punishment for night season offenses, the legislature clearly intended the time element to be a vital consideration.[7]

The majority opinion raises the question of sufficiency of evidence of a material element of the crime. In *Adams v. State*, the Ohio Supreme Court held that the time element must be proved beyond a reasonable doubt.[8] "Night season" has been judicially defined as "the period of time from the termination of daylight in the evening, to the earliest dawn in the morning."[9] A specific period then, if not too precise in definition, is embodied in the term "night season." It will serve the purpose of this analysis to consider "night season" as the time between sunrise and sunset.[10] In *State v. Walshenberg*, the court held by way of dictum that "circumstantial evidence may be as satisfactory as direct evidence if the circumstances are established and the inferences reasonably follow."[11] The statement by the dissent in the instant case that the evidence must be direct before a conviction may stand[12] does not reflect the present status of the law. However, before circumstantial evidence may sustain a conviction it must be compelling and must not be consistent with any other reasonable hypothesis.[13] Moreover, it is within the purview of the appellate court to review the record to determine whether it contains evidence from which the jury would be justified in concluding that the accused was guilty beyond a reasonable doubt.[14]

The pronouncement in *Stuttler* reflects the language of *State v. Butler*,[15] but an analysis of the facts reveals a substantial distinction. In *Butler*, the court concluded that the jury, drawing on the common experience of mankind,[16] might find from the facts and circumstances of the case that the offense occurred in the night season. In that case the offense was committed

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thousand dollars fine, and not more than 12 months imprisonment for burglary. The maximum penalty for the comparable offense in the daytime is a four hundred dollar fine and imprisonment not exceeding six months. See 1 Chase, Revised Statutes of Ohio 591 (1833).

[7] See, *e.g.*, Adams v. State, 31 Ohio St. 462 (1877).

[8] *Ibid.* at 463.

[9] State v. Walshenberg, 7 Ohio N.P. 219, 8 Ohio Dec. 665 (1900).

[10] There have been no reported Ohio decisions since Walshenberg, *ibid.* defining with any greater precision what is meant by the term "night season." The time of sunset and sunrise clearly constitute the outer limits of such a period and probably the courts would delimit the time so as not to include dusk and dawn thereby making the period of night season even of shorter duration.

[11] *Supra* note 9, at 221.

[12] *Supra* note 2, at 316.

[13] Atkinson v. State, 8 Ohio L. Abs. 686 (1930).

[14] State v. Petro, 148 Ohio St. 473, 76 N.E.2d 355 (1948). Cooper v. State, 121 Ohio St. 562, 170 N.E. 355 (1930).

[15] 57 Ohio L. Abs. 385, 94 N.E.2d 457 (1949).

[16] *Ibid.* at 391.

after 5:00 PM on December 24 and before 9:00 AM on December 25. Two flashlights were found at the scene of the crime. There had been a breaking of the front door of a downtown building in Columbus, Ohio, and the safe had been forcibly opened. The court permitted a finding on these facts that the breaking and entering occurred in the night season. Sunset for December 24, 1957, for the area in question was 5:11 PM and sunrise on the 25th was 7:52 AM.[17] Therefore, there was considerably less than two hours of daylight over a fifteen hour period in which the offense was committed.

In *Stuttler* there is no direct evidence indicating that the act was committed in the night season (as for example the flashlights in *Butler*). Sunset was 7:59 PM on the 9th and sunrise was 5:02 AM on the 10th. There was a period of nearly eight hours of daylight during the time in which the offense occurred as compared with less than two hours in *Butler*. Consequently, the pronouncement in *Butler* applied to the facts of this case takes on a substantially greater import.

The court also cited *State v. Richards*,[18] involving the burglarizing of a store. There the offense occurred after 7.00 PM but before 7.00 AM the following morning. The sun had set by 7:00 PM and rose at 5:53 AM. The manager of the store resided near enough to the store so that he had a clear view of the back door where defendant entered. He testified that he arose at 5:45 AM and that approximately half of the time between then and 7:00 AM he was outside where he would certainly have observed anything of an unusual nature. The remainder of the time he was in the kitchen where he could see the store.[19] In this case there were approximately twelve hours during which the offense was committed. Only a little over an hour was daylight and the store was under at least perfunctory surveillance during this time. Clearly *Richards* does not support the sufficiency of circumstantial evidence of the nature presented in *Stuttler*.

A review of cases in other jurisdictions reveals a reluctance to permit speculation by the jury as to the time the offense was committed.[20] Considerations of location of the structure burglarized,[21] character of goods taken,[22] and evidence in itself tending to establish time, *e.g.*, flashlights, are

[17] Sunset and sunrise taken from Tables of Sunset and Sunrise for Columbus Area compiled by the Naval Observatory, Washington, D.C.

[18] 29 Utah 310, 81 P. 142 (1905).

[19] State v. Richards, *supra* note 22, at 313.

[20] Where act was committed between 6 PM and 7 AM with sunset at 6:30 an inference that the act was committed in the night season was held invalid. People v. Griffin, 19 Cal. 578 (1875). Nor was a delimitation of 6 PM to 7 AM sufficient to sustain a burglary conviction as to the breaking and entering of a barn in a Nevada town. State v. Gray, 23 Nev. 301, 46 P. 801 (1896). A recent Kansas decision construing similar statutory provisions held that where the time was not established the presumption is in favor of the accused. State v. Cone, 171 Kans. 344, 232 P.2d 470 (1951).

[21] Myers v. State, 4 Ohio L. Abs. 107 (1925).

[22] Williams v. State, 60 Ga. 445 (1878).

significant where the time delimitation does not itself resolve the question. However, the jury may not draw the inference that the offense was committed at night where the delimitation includes a substantial period of daylight or where other circumstances are of such a nature that more than one reasonabble conclusion might follow.[23]

It may be observed that there are policy considerations inherent in the requirements of sufficiency of evidence independent of general rules of evidence. In the crime of burglary itself, an essential element is that the act be done with the intent to commit a felony. Yet, because the element of intent is difficult to prove and because the evils at which the statute is aimed are present regardless of actual intent, many jurisdictions permit the conviction to stand where the only evidence as to intent was that the breaking and entering had been established.[24] The proof of one element raises an inference sufficient to establish the other.

Recalling that the interest of society protected by burglary statutes is the prevention of personal violence likely to arise from a forcible invasion of an inhabited structure, it is not unreasonable to assume that the victim will believe that the purpose of the breaking and entering is to commit a felony; therefore, violence is likely to occur regardless of the actual intent of the defendant. Therefore, to permit an inference of felonious intent merely by showing a breaking and entering is consistent with the theory of the crime itself.

This justification, however, is not available as to the time element. Assuming the validity of the proposition that violence is more likely at night than in the day, there is no justification to permit a conviction on anything less than the usual standards of sufficiency of the weight of evidence.[25] This conclusion is more apparent when considered in the light of the legislative mandate that the night time offense is of a more serious nature.

The *Stuttler* decision, though ostensibly a reiteration of the pronouncement in *Butler*, by application to circumstances far less conclusive, permits the jury to make a finding based on the common experience of mankind that such acts would not ordinarily be committed in the daytime.[26] In view of the difference in penalty involved, conviction of the night time offense on this basis is inconsistent with basic concepts of criminal justice.

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[23] See, *e.g.*, People v. Williams, 57 Cal. App. 267, 207 P. 255 (1922). "Upon this essential point [time of offense] the jury made no deductions from the facts. They simply guessed. A verdict resting upon such conjecture cannot be permitted to stand." Leisenberg v. State, 60 Neb. 628, 84 N.W. 6 (1900).

[24] See, *e.g.*, People v. Henderson, 138 Cal. App. 505, 292 P.2d 267 (1956).

[25] Nor is there justification for permitting an inference of guilt of the night time offense by virtue of the unwillingness of the accused to testify. If the accused pleads innocent to the crime itself, as a matter of logic he cannot take the stand to establish the time of the offense. The point is not directly raised in this case.

[26] Ohio v. Stuttler, *supra* note 2, at 313.